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Supreme Court, U.S.
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No. 94-1838

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

OXY USA INC.,

Petitioner,

V.

CONTINENTAL TREND RESOURCES, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

SUPPLEMENTAL BRIEF

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On January 17, 1996, Petitioner OXY USA Inc. ("OXY") submitted a Supplemental Brief to bring to the Court's attention the recent opinion of *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995). Pursuant to Supreme Court Rule 15.8, Respondents Continental Trend Resources, Inc.; Harold G. Hamm, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; Gary H. Wright; Cindy Wright; Jeffrey B. Hume; and Farrar Oil Company (collectively "Continental"), respectfully submit this Supplemental Brief in support of its Brief in Opposition to Petition for Writ of Certiorari to address the *Pulla* decision.

OXY cites *Pulla* as bringing into "sharp focus" the supposed conflict in the circuits regarding the proper standards to be applied by federal courts in reviewing punitive damage awards for excessiveness. (Petitioner's Supplemental Brief, p. 4.) In *Pulla*, however, retired Justice White, writing for the panel, squarely rejected OXY's primary argument in its Petition for Certiorari that the federal Constitution requires a reviewing court to undertake a comparative analysis of awards in determining whether a particular punitive damage award is excessive. *Pulla*, 72 F.3d at 658-59. Instead, the *Pulla* court applied the same reasonableness test set forth in *TXO Production Corp. v. Alliance Resources Corp.*, __ U.S. __, 113 S.Ct. 2711 (1993) and requested by Petitioners and utilized by the Tenth Circuit in this case. *Compare Pulla*, 72 F.3d at 658-59 with the Tenth Circuit decision. Pet. App. 15a-22a.

In *Pulla*, the Eight Circuit reversed a punitive damage award of $500,000 where the actual damages were $2 and (1) the subject misconduct (the invasion of privacy to the plaintiff) was an isolated act, (2) there was no evidence that any other individual's privacy was at risk, (3) there was no

evidence rebutting Amoco's assertion that the event was an isolated and rare incident, (4) there was no company policy involved, and (5) the bad actors were low level company employees who had acted without the knowledge of their superiors. *Pulla*, 72 F.3d at 658-61. The *Pulla* court emphasized that the facts before it were in "stark contrast" to the facts in *TXO* and thus, given the limited offensiveness of Amoco's actions and the unlikelihood of any serious potential harm from its conduct, the 250,000 to 1 ratio between actual and punitive damages was excessive. *Pulla*, 72 F.3d at 660-61.

The facts in *Pulla* also stand in stark contrast to the facts in this case. Here, both the district court and the Tenth Circuit relied on a record that included a pattern of overt instances of egregious misconduct directed at both Respondents and other producers. *See* Respondents' Brief, pp. 2-3, 23-30; Pet. App. 11a, 14a-22a, 39a-40a, 47a-53a. This evidence included such misconduct as shutting in other producers' wells to prevent them from selling gas in the free market; falsifying and altering documents; fraud; devising an overall "plan" to prevent Continental and other producers from selling their gas in the free market; impermissibly charging all producers for millions of dollars of gathering fees not allowed under the OXY contracts; asserting sham contract rights; and direct testimony from OXY admitting that its conduct was intended to deter all producers from selling gas in the free market. *Id.* As the Tenth Circuit noted:

> The district court also observed that the jury was "visibly reactive to" the testimony of OXY's corporate representative that "'we cannot let [plaintiffs] get away with this or everybody else will try to do it [bypass Rodman].

> It was a 'the natives are restless, we better get out there and subdue them' kind [of] presentation."

Pet. App. 21a. Thus, unlike *Pulla*, OXY's misconduct involved the implementation of a plan directed at over 6,000 contracts with admissions from OXY that its misconduct was calculated to (1) make money, and (2) interfere with the other 6,000 contracting parties' rights to sell a scarce natural commodity -- natural gas -- in the free market.[1] Here, "the potential damages evaluated in light of defendant's actual conduct" was not predicated on similar "hypothetical torts" but rather evidence of actual widespread misconduct coupled with admissions by corporate representatives that the conduct was directed at thousands of producers.

The *Pulla* court was also troubled by the rare and isolated nature of Amoco's conduct. *Pulla*, 72 F.3d at 660. As the *Pulla* court observed:

> In the instant case, there is no evidence or indication that Wieczorek's conduct reflected a company policy or practice as was the case in *TXO*. In contrast, in *TXO*, the plaintiff presented evidence that TXO deliberately engaged in this wrongful conduct, and that prior lawsuits had been filed against it for similar misdeeds. [*Citations omitted.*] Simi-

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[1] One OXY's corporate representative specifically testified that the conduct was directed to at least "500 or so" contracts. Pet. App. 52a. Other OXY witnesses and OXY's counsel referred to 6,000 contracts. Pet. App. 15a.

> larly, we would view Amoco's conduct in a more critical light if Pulla had presented any evidence rebutting Amoco's assertion that this was an isolated and rare incident.

In this case, contrary to *Pulla*, both the district court and the Tenth Circuit were faced with a record showing that OXY's top level executives engaged in a deliberate plan of trickery and deception orchestrated by its legal department, together with findings that OXY's conduct was reprehensible, malicious and fraudulent. *See* Respondents' Brief, pp. 2-3, 23-30; Pet. App. 11a, 14a-22a, 39a-40a, 47a-53a. This pattern of misconduct was not a "rare and isolated" incident; rather, it occurred over a period of several years involving thousands of contracts. *Id.*; Pet. App. 15a.

Thus, unlike *Pulla*, this case presents a classic case of punitive damages bearing a reasonable relationship to the harm that actually occurred when reviewed in light of the legal standards that this Court, the *Pulla* court and the Tenth Circuit have found should be applied in a substantive due process review. *See TXO*, 113 S.Ct. at 2721-23 (plurality opinion), 113 S.Ct. at 2726 (Kennedy, J., concurring); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-20 (1991); *Pulla*, 72 F.3d at 659-61; Pet. App. 12a-22a.

The *Pulla* case thus presents yet another example of how two different circuits can apply the same legal standards in the same manner and reach different results because the awards were imposed under different circumstances, against different defendants, and with very <u>different facts</u>. This Court has never held that the Constitution prohibits large damage awards. As the *Pulla* court observed, the focus of the reviewing court is to ensure that, under the circumstances

of the particular case, the award is not grossly excessive or unreasonable. 72 F.3d at 658-59.

The decision below is also consistent with the Eighth Circuit's observations that this Court has viewed wealth as an appropriate factor to ensure that an award will adequately deter any future misconduct. 72 F.3d at 658-59. OXY's argument that the size of the punitive damage award in this case can only be explained by OXY's status as a wealthy corporation is remarkable. It ignores the overwhelming record evidence and findings of the jury, district court and Tenth Circuit of OXY's intentional pattern of tortious misconduct. This case involves the kind of deliberate, evil-minded wrongdoing that has given rise to punitive damages in this country since its founding. The enormous amount of evidence of OXY's pattern of trickery and deception shows that a punitive damage award of less than 1% of OXY's net worth and less than one week of revenue falls well within the parameters of this Court's "reasonableness analysis."

Pulla, therefore, further establishes that the various federal courts of appeals' review process is consistent and uncontroversial. As such, the *Pulla* case stands in "stark contrast" to OXY's contention that there is a conflict in the circuits regarding whether the reviewing courts of appeals must apply a "comparative analysis," and further demonstrates that there is no basis to grant certiorari in this case.

Respectfully submitted,

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